

The regulation of air pollution that crosses state borders

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As many of us were reminded last summer when forest fires in Canada turned New York City's air to the color orange, air pollution is transported by the wind. Fortunately, here in the United States, the

Commerce Clause of the Constitution gives the federal government the authority to regulate business practices that cross state lines.

[The EPA's air pollution authority](#), enshrined in the Clean Air Act provides a specific mechanism for controlling cross-state [air pollution](#). According to the EPA's website:

"The Clean Air Act's 'good neighbor' provision requires EPA and states to address interstate transport of air pollution that affects downwind states' ability to attain and maintain National Ambient Air Quality Standards (NAAQS). Specifically, Clean Air Act section 110(a)(2)(D)(i)(I) requires each state in its State Implementation Plan (SIP) to prohibit emissions that will significantly contribute to nonattainment of a NAAQS, or interfere with maintenance of a NAAQS, in a downwind state. The Act requires EPA to backstop state actions by promulgating Federal Implementation Plans (FIPs) in the event that a state fails to submit or EPA disapproves good neighbor SIPs."

In the latest attack on the EPA's authority to regulate our environment, the U.S. Supreme Court has agreed to decide if the agency has exceeded its authority in its effort to prevent air pollution transported from one state to a neighboring state. According to a piece by Andrew Chung in Reuters:

"The U.S. Supreme Court on Wednesday said it would hear a bid to block the Environmental Protection Agency from enforcing a federal regulation aimed at reducing ozone emissions that may worsen air pollution in neighboring states. Acting on requests by the states of Ohio, Indiana and West Virginia, as well as pipeline operators, power producers and U.S. Steel Corp (X.N), to avoid complying with the federal 'Good Neighbor' plan restricting ozone pollution from upwind states, the court said it would hear arguments in the dispute in

February....

"At issue in the current dispute is an EPA rule, finalized in June by President Joe Biden's administration, regulating ozone, a key component of smog, in a group of states whose own plans the agency determined did not satisfy the 'Good Neighbor' provision of the Clean Air Act requiring efforts to account for pollution that could drift into states downwind. The agency said the inadequate plans in 23 states required a federal program to reduce emissions from large industrial polluters in those states."

Since the authority to regulate this type of pollution is clearly authorized by the Constitution and the Clean Air Act, the Supreme Court must somehow substitute its scientific expertise for the EPA's and accept the argument that ozone pollution is not dangerous. While I am far from a lawyer, the EPA clearly has the authority to regulate ozone.

The overturning of *Roe v. Wade* seemed to set in motion the ridiculous national phenomenon of lawyers substituting their medical advice for that of a woman's doctor. Some U.S. courts these days don't seem to give much weight to scientific or technical expertise. Typically, the Supreme Court disguises this scientific judgment in a dubious legal argument, but the outcome is to undermine action based on the scientific expertise of the EPA.

The mechanics of the process in this case involved a large number of states that proposed state air pollution control plans that the EPA considered inadequate. The ability of these plans to reduce the scientifically proven harm of ozone pollution was the basis for the EPA's determination. This triggered the promulgation of a federal rule mandating ozone reduction in the states with inadequate plans.

This past February, the EPA found that 23 states had air pollution

control implementation plans that failed to protect downwind states from ozone pollution. While the basic structure of the Clean Air Act requires a partnership between the [federal government](#) and the states, conservative "red" state governments increasingly oppose any federal efforts to require states to adhere to national policy. They are not interested in partnering with the federal government but prefer to fight the feds for political points and media attention.

Perhaps the most extreme case of this phenomenon has been those states that continue to refuse federal funding under the Affordable Care Act that is available to expand Medicaid coverage in their state. They so oppose federal health care policy that they turn down federal funding to pay the health care costs of their own people. It is no surprise that local power companies and other polluters resist adhering to national air pollution standards. It's a little amazing that the public goes along with this.

While the basis for the federal good neighbor rule is the impact of air pollution on neighboring states, the fact is that air pollution also harms people within the polluting state. The pollution created in Ohio doesn't magically appear in New Jersey; first, it hits Cleveland, Columbus, and Cincinnati. And in all likelihood, the concentration of pollutant load is greater the closer one lives to the source of emissions.

By the time the ozone or other pollutants hit New Jersey, they've had some time to be dispersed in more than one direction. The ozone is still dangerous, but to use the old saying: "the solution to pollution is dilution."

The questions I have for the elected officials fighting the Clean Air Act are: Don't the people in your state breathe? Aren't they subject to the same lung diseases and cancers that blue-state residents endure? Why are you willing to subject your constituents to health risks?

The answer of course is the political clout of the power generation and manufacturing companies who are unwilling to clean up their act. They don't want to pay the costs of retrofitting their outmoded, polluting technologies. This, when coupled with right-wing, anti-regulatory ideologies and fears of the big bad "deep state," results in opposition to rules requiring clean air. According to this ideology, the EPA is simply a power-grabbing bunch of bullies forcing states to bend to their unreasoning rules.

Politicos like Donald Trump and many other conservatives consider all government regulations bad, anti-business, and destroyers of innovation and jobs. I wonder how they'd feel if the FAA stopped regulating flight paths or if the police decided to stop enforcing the rules against homicide. Civilization requires rules.

While there are plenty of examples of over-regulation and incompetent regulators, America has a much greater problem with under-regulation. Moreover, as I often note, regulation stimulates far more innovation than it discourages. When companies read the regulatory handwriting on the wall and know they will need to comply with new rules, they often hire engineers and get creative about redesigning products and work processes.

We certainly saw this with automobile safety and fuel economy regulations. The modern computer-laden motor vehicle is far more efficient and cost-effective than its mid-twentieth-century mechanical ancestors. While that does not fit into the preconceptions of anti-regulatory ideologues, proposed regulations can contribute to the modernization and ultimate competitiveness of a business. Many times, new regulations, just like new competitors, force organizations to rethink operations that need new approaches.

I understand the fear of an arrogant and all-powerful government

regulator. But the lawyers making decisions on which rules stay and which rules go need to understand that our world and our economy are becoming more technologically complex and interconnected.

Unanticipated impacts have become routine, and our need for agile and responsive regulation is growing. Regulating air pollution that causes us physical harm is a pretty straightforward problem. That science is easily understood.

But what happens when we need to regulate social media algorithms and artificial intelligence misbehavior? If we can't get the easy stuff right, what chance do we have when the more difficult problems require government guardrails?

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